

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GIBRAN ANDRE KINNARD,

Defendant-Appellant.

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UNPUBLISHED

October 7, 2003

No. 240842

Oakland Circuit Court

LC No. 02-182416-FH

Before: Smolenski, P.J., and Markey and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of the crime charged, one count of third-degree criminal sexual conduct, MCL 750.520d(1)(a). The trial court sentenced him to a term of twenty-one months to fifteen years' imprisonment. Defendant appeals as of right the trial court's denial of his motion to instruct the jury on lesser cognate offenses to the primary charge. Additionally, defendant appeals as of right the trial court's scoring of offense variables 10 and 11 and the resulting sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

**I. Facts and Proceedings**

The victim, a fifteen-year-old high school student, testified at trial that on December 31, 2001, she and her friend accompanied defendant, a twenty-five-year-old man, to the house of Trevor Fort. Upon arriving at the house, defendant and Fort consumed undetermined amounts of alcohol, and provided alcohol for the victim and her friend, who was also underage.

As the night proceeded the group paired off into couples and retired to two separate bedrooms. In the bedroom, the victim and defendant began kissing, and defendant testified that the victim performed oral sex upon him. When defendant attempted to escalate the interlude, the victim told him to stop. Defendant initially assured the victim that they would not have sex, but then retrieved a condom, climbed on top of the victim, pinned her hands above her head, and against the victim's resistance forced his penis into her vagina. The victim reported the incident to her mother, who contacted the Southfield Police.

On January 9, 2002, defendant was arrested and taken to the Southfield Police Department. While in custody, defendant wrote out a statement admitting that he had had sex with the victim. Defendant was then charged with criminal sexual conduct in the third degree.

Near the conclusion of the trial, defendant moved to have the jury instructed on the lesser cognate offense of assault and battery. Defendant's motion was denied, and the jury subsequently returned a verdict of guilty as charged. During sentencing, defendant objected to the scoring on offense variables 4,<sup>1</sup> 10, and 11 as being without evidentiary basis. Defendant now asserts on appeal that the trial court erred by failing to give the requested assault and battery jury instruction. Defendant also challenges the sentencing guidelines scoring and contends that his sentence constitutes a departure from the sentencing guidelines without substantial and compelling justification.

## II. Standards of Review

We review the trial court's decision to deny defendant's motion to instruct the jury on lesser cognate offenses for clear error and review de novo the court's interpretation of the law. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Contrary to defendant's assertions, a trial court's decision regarding the scoring of offense variables is reviewed for abuse of discretion and will be upheld if any supporting evidence exists. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Each claim of error was properly preserved during the trial and sentencing of defendant.

## III. Analysis

Defendant argues that the trial court erred when it denied his motion to instruct the jury on lesser cognate offenses. We disagree.

A defendant does not have a right to have a jury instructed on lesser cognate offenses. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). In *Cornell*, our Supreme Court held that "MCL 768.32 only permit[s] consideration of necessarily lesser offenses, not cognate lesser offenses." *Id* The Court went on to state that this holding "would foreclose consideration of cognate lesser offenses, which are only 'related' or of the same 'class or category' as the greater offense and may contain some elements not found in the greater offense." *Cornell*, *supra*. Furthermore, the Supreme Court in *Cornell* expressly overturned much of the authority that defendant relies upon on appeal. *Cornell*, *supra* at 367.

Accordingly, the trial court did not err when it denied defendant's motion to instruct the jury on lesser cognate offenses.

Defendant next argues that this Court should abandon the traditional standard of review of lower court decisions regarding offense variable scoring. Under the current standard of review, a lower court's scoring decision will be upheld if any supporting evidence exists on the record below. Defendant argues that since sentencing guidelines are now statutory, due process requires us to review offense variable scoring decisions under a de novo standard, and that they must be proven at the trial court level by a preponderance of the evidence. Defendant also contends that under this proposed standard, the evidence on the record below was insufficient to

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<sup>1</sup> Although preserved on the record, defendant has not appealed the scoring of offense variable 4.

support the trial court's decision to score offense variables 10 and 11 at ten and twenty-five points respectively, and therefore his sentence is an unwarranted departure from the sentencing guidelines. We disagree.

In *Hornsby, supra*, decided four years after the Legislature enacted statutory sentencing guidelines, this Court reaffirmed our earlier decision in *Elliot* that “[s]coring decisions for which there is any evidence in support will be upheld.” *Hornsby, supra* at 468, quoting *Elliot, supra* at 260. Defendant's argument is therefore without merit.

Defendant also objects to the trial court's assessment that ten points should be scored for offense variable 10, on the basis that defendant exploited the victim's vulnerability due to her age. MCL 777.40(1)(b). Defendant claims that there was insufficient evidence that the victim was actually vulnerable, or that he took advantage of any such vulnerability. This argument is unpersuasive.

The record is sufficient to support a finding of vulnerability within the meaning of MCL 777.40(1)(b). Defendant admitted that he took the victim to his house and provided her with alcoholic drinks. The record supports the trial court's conclusion that defendant isolated the victim so that he could manipulate and coerce her into engaging in sexual relations. Moreover, defendant was well aware of the fact that the victim was still a teenager in high school, and that she was at least eight years his junior.

Defendant also asserts that there was an insufficient evidentiary basis for the trial court's decision to assess twenty-five points for offense variable 11. We disagree.

MCL 777.41, offense variable 11, requires the trial court to assess twenty-five points for sexual penetrations “arising out of the sentencing offense” other than the penetration that formed the basis for the underlying convicted crime. *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002). Although, as defendant asserts, the victim never alleged any additional penetration in her own account of the incident, defendant himself admitted to the additional penetration during his own testimony. Specifically, defendant stated that the victim performed oral sex on him during their encounter. Because this additional penetration occurred during the commission of the underlying conduct that lead to defendant's conviction, it provided the trial court with a sufficient basis for its scoring decision on offense variable 11.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Kurtis T. Wilder